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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES ROBERT BLANKENSHIP,

Defendant and Appellant.

E069374

(Super.Ct.No. 16CR-030837)

OPINION

APPEAL from the Superior Court of San Bernardino County. Joel Agron,  
Temporary Judge. (Pursuant to Cal. Const., art, VI, § 21.) Affirmed.

Johanna R. Pirko, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney  
General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson, Allison Acosta  
and Felicity Senoski, Deputy Attorneys General, for Plaintiff and Respondent.

Pursuant to a plea agreement, defendant and appellant James Robert Blankenship  
pled guilty to unlawful driving of a vehicle (Veh. Code, § 10851, subd. (a)) and admitted

that he had one prior conviction under Penal Code<sup>1</sup> section 666.5 and one prior strike conviction (Pen. Code, §§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)). In return, a trial court sentenced him to three years in state prison. At a subsequent restitution hearing, the court ordered defendant to pay \$2,788.40 in victim restitution for items that were missing from the victim's car, a damaged transmission, mileage, and lost wages.

On appeal, defendant argues that the court abused its discretion in ordering him to pay restitution, since he pled guilty to unlawful driving of a vehicle and not the taking of the vehicle. We affirm.

### PROCEDURAL BACKGROUND

The court held a preliminary hearing at which a police officer testified that he responded to a call regarding reckless driving, and the vehicle was reportedly stolen. He located the vehicle and conducted a traffic stop. Defendant was the driver of the car. He had defendant throw the key to the car to him. The car was a Honda, but the key defendant threw was a shaved key with an Isuzu logo. Defendant told the officer he had purchased the car the day before. The officer ran a records check and discovered that the car was stolen the day before. The officer called the victim, who came to the scene and identified the car as his. He described property that was in the car, and the officer found the items the victim identified in the car. The victim said he did not know defendant and had not given him permission to drive his car. However, the victim told the officer he believed the person who took his car was someone he knew named Mr. A.

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<sup>1</sup> All further statutory references will be to the Penal Code, unless otherwise noted.

Defendant was charged by information with one count of unlawful driving or taking of a vehicle. (Veh. Code, § 10851, subd (a), count 1.) The information also alleged that defendant had prior vehicle theft convictions within the meaning of Penal Code section 666.5 and one prior strike conviction (Pen. Code, §§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)), and that he had suffered four prior prison terms (Pen. Code, § 667.5, subd. (b)).

Defendant entered a plea agreement and pled no contest to unlawful driving of a vehicle (Veh. Code, § 10851, subd. (a)) and admitted that he had one prior conviction of Vehicle Code section 10851, subdivision (a), within the meaning of Penal Code section 666.5. The agreement specified that defendant would be sentenced to three years in state prison and that he would pay “actual restitution.” It also included a *Harvey*<sup>2</sup> waiver. The parties stipulated that the preliminary hearing transcript provided a factual basis for the plea. The court found that defendant voluntarily, knowingly, and intelligently entered the plea, and that there was a factual basis for the plea. It then dismissed the remaining counts and allegations.

After the court took defendant’s plea and sentenced him, it asked the parties about restitution. The prosecutor requested the court to refer the matter to probation for a restitution memo and for a hearing. The court set the hearing, and defendant waived his presence at the hearing. His counsel joined.

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<sup>2</sup> *People v. Harvey* (1979) 25 Cal.3d 754 (*Harvey*).

The court subsequently held the restitution hearing, and the prosecutor called the victim as a witness. He testified that his car was stolen from his home, and he received it back from the police one day later. He said there were tools and other personal belongings in the car when it was taken, and they were missing when he picked up the car the next day. The tools included a paint gun, drills, a grinder, and hammers. He estimated the paint gun, which he used to paint cars for work, was worth \$750; the grinder was worth \$300; the clothes that were taken were worth about \$200. The victim testified that some documents were also missing, including his license, a permit, his visa, his passport, a bank card, and his birth certificate. He said it cost \$380 to replace his passport. He said he had about \$200 in cash in his car, since he sometimes did side jobs and would get paid in cash. The victim said he had to drive from Hesperia to Yucca Valley to get his car back from the police. He paid his friend \$50 for gas for his friend to drive him there. The victim also lost a day of work to attend the restitution hearing, which he said cost him about \$130.

On cross-examination, the victim testified that his car was stolen from his residence. When defense counsel asked if he saw who stole the car, the prosecutor objected as to relevance. Defense counsel said the victim saw Mr. A. steal his car. The prosecutor conceded that defendant apparently got the car from someone else but argued that just because someone else could also be responsible for restitution, the fact was that defendant agreed to pay restitution for a significantly reduced plea bargain agreement. The court proceeded to ask the victim if he thought Mr. A. or defendant took the items from the car. The victim said he could not answer that question because he believed

Mr. A. took his car, but it was found in defendant's possession. The victim testified that Mr. A. took his car from his driveway, drove around in it, and drove back around to taunt him. The victim also said when he received his car back, the transmission was "burned," and he had to replace it at a cost of \$300.

The prosecutor asked the court to order defendant to pay restitution for the items that were in the victim's car on the day defendant took possession of it. She pointed out that defendant, by his own admission in the police report, stated he bought the car on the day it was taken, in the same city where it was taken. The prosecutor also asked the court to order restitution for the victim's mileage for coming back and forth for the hearing, which she calculated was \$95.40, and for the transmission.

Defense counsel argued that the losses did not result from the crime defendant was convicted of. He conceded that defendant pled guilty to Vehicle Code section 10851 and actual restitution was included in the plea agreement. However, he argued that nothing was expressly written in the agreement, and there was nothing to imply that defendant "was signing on for grand theft of property."

The court looked at the plea agreement again, noting the words "actual restitution," and it asked the prosecutor her opinion on what that term meant in this case. The prosecutor stated that, at the time of the plea, the parties did not know the extent of the restitution. However, she said "the reason why the offer was so generous . . . was to take care of the victim." The prosecutor added that if the victim's losses were not going to be satisfied, then the plea was illegal since she could not bargain away a victim's right

to restitution. She added that the wording of the plea—unlawful driving versus unlawful taking—had nothing to do with restitution.

The court asked defense counsel what the meaning of “actual restitution” was, and he said he “inherited the case” and there was nothing in the notes on restitution. He contended that they knew the actual thief was Mr. A., and it was not logical that Mr. A. would transfer possession of the car with valuables still in it. Defense counsel conceded that the crime defendant was convicted of was the unlawful taking or driving of a vehicle but pointed out that defendant did not take the car. The police report indicated that defendant said he bought it from a woman. Defense counsel added that defendant took the plea reluctantly. Counsel agreed that the victim was entitled to restitution, not from defendant, but from Mr. A.

The prosecutor, who worked on the plea agreement, disagreed with defense counsel. She said defendant wanted this plea agreement, and he agreed to pay restitution.

The court agreed with the prosecutor’s comments and stated that it could not ignore the fact that defendant had a Vehicle Code section 10851 history. It also noted that Vehicle Code section 10851 “was originally charged,” and that it was common for a Vehicle Code section 10851 to include damages to the car, including missing items inside it. It concluded, “I have to believe that [defendant] had some idea that restitution could also include tools that were there in the car.” The court stated that it did not know how defendant got the car, but it did not believe his story; thus, it could not come to any conclusion on that issue. However, the court noted that less than a day before defendant had the car, there were a lot of valuable tools inside, and it believed the victim deserved

his restitution. The court then awarded the victim a total of \$2,788.40, which included costs for the paint gun, grinder, other tools, a passport, cash, mileage, lost wages, and the transmission.

## ANALYSIS

### The Court Properly Ordered Defendant to Pay Restitution

Defendant argues that the court abused its discretion in ordering him to pay restitution because the victim's losses stemmed from a crime to which he did not plead guilty. He asserts that he only pled to the unlawful *driving* of a vehicle, which occurred after the theft. He further states it was undisputed that Mr. A. stole the car. He then contends that it was the theft of the car by Mr. A, not defendant's posttheft driving, which led the victim to sustain his losses. Thus, he argues that the restitution order must be reversed. We see no abuse of discretion.

#### *A. Relevant Law*

Section 1202.4, subdivision (a)(1), provides: "It is the intent of the Legislature that a victim of crime who incurs an economic loss as a result of the commission of a crime shall receive restitution directly from a defendant convicted of that crime." Section 1202.4, subdivision (f), provides: "[I]n every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court."

“The standard of review of a restitution order is abuse of discretion. ‘A victim’s restitution right is to be broadly and liberally construed.’ ” (*In re Johnny M.* (2002) 100 Cal.App.4th 1128, 1132.) “When considering a trial court’s restitution determination, we consider whether it is arbitrary, capricious, or beyond the bounds of reason under all the circumstances.” (*People v. Hove* (1999) 76 Cal.App.4th 1266, 1275.)

*B. The Trial Court Did Not Abuse its Discretion*

Defendant asserts that section 1202.4 limits the scope of victim restitution to losses incurred as a result of the crime “for which the defendant has been convicted.” “Courts have interpreted section 1202.4 as limiting restitution awards to those losses arising out of the criminal activity that formed the basis of the conviction.” (*People v. Woods* (2008) 161 Cal.App.4th 1045, 1049.) We acknowledge that the losses arose out of the unlawful taking of the vehicle. However, since defendant signed a plea agreement, there was no evidence presented as to who actually stole the car. Furthermore, defendant pled no contest to a violation of Vehicle Code section 10851, and the plea agreement shows that one of the conditions of the bargain was that he agreed to pay “actual restitution.”

Moreover, as the prosecution pointed out at the restitution hearing, at the time of the plea agreement the parties did not know the amount of the restitution. At sentencing, the court referred the matter to the probation department for a restitution memo. The court also set a restitution hearing, defendant waived his presence at the hearing, and his counsel joined in the waiver. In other words, there was no dispute that defendant was going to pay restitution, in an amount to be determined. We note that the probation



department submitted a restitution memo and recommended victim restitution in the amount of \$3,009.

In addition, defendant's plea agreement contained a *Harvey* waiver. In *Harvey*, *supra*, 25 Cal.3d 754, the Supreme Court held that "[i]mplicit in . . . a plea bargain . . . is the understanding (in the absence of any contrary agreement) that defendant will suffer no adverse sentencing consequences by reason of the facts underlying, and solely pertaining to, the dismissed count." (*Id.* at p. 758.) "It was from the above parenthetical the notion of a *Harvey* waiver developed. A defendant who signs the typical waiver form agrees to allow the sentencing judge to consider his entire criminal history, including any unfiled or dismissed charges." (*People v. Goulart* (1990) 224 Cal.App.3d 71, 80 (*Goulart*).)

Section 1192.3 provides: "(a) A plea of guilty or nolo contendere to an accusatory pleading charging a public offense, . . . which public offense did not result in damage for which restitution may be ordered, made on the condition that charges be dismissed for one or more public offenses arising from the same or related course of conduct by the defendant which did result in damage for which restitution may be ordered, may specify the payment of restitution by the defendant as a condition of the plea or any probation granted pursuant thereto, so long as the plea is freely and voluntarily made, there is factual basis for the plea, and the plea and all conditions are approved by the court. [¶] (b) If restitution is imposed which is attributable to a count dismissed pursuant to a plea bargain, as described in this section, the court shall obtain a waiver pursuant to *People v. Harvey* (1979) 25 Cal. 3d 754 from the defendant as to the dismissed count." "This

provision clearly recognizes that restitution ordered on dismissed counts is valid provided the plea under which payment of restitution is made a condition was ‘freely and voluntarily made, there is factual basis for the plea, and the plea and all conditions are approved by the court.’ ” (*People v. Beck* (1993) 17 Cal.App.4th 209, 216 (*Beck*).)

Here, the *Harvey* waiver contained in defendant’s plea agreement provided: “I waive my rights regarding dismissed counts and/or allegations and any charges the district attorney agrees not to file to the extent that the Court may consider these factors in deciding whether or not to grant probation and in deciding whether or not to impose a midterm, aggravated or mitigated prison term . . . and as to restitution.”

As the court noted at the restitution hearing, the record shows that defendant was originally charged by information with the crime of driving or taking a vehicle without consent, in violation of Vehicle Code section 10851, subdivision (a). Pursuant to the agreement, defendant pled no contest to only driving a vehicle without consent. Thus, it appears that the district attorney agreed to dismiss the allegation regarding the taking of the vehicle. However, pursuant to the *Harvey* waiver, the court could still consider the original charge with regard to restitution. (See Pen. Code, § 1192.3; see also *Goulart*, *supra*, 224 Cal.App.4th at p. 80 and *Beck*, *supra*, 17 Cal.app.4th at p. 216.)

Therefore, in light of the plea agreement expressly stating that defendant would pay “actual restitution,” and in view of the *Harvey* waiver, restitution on the dismissed

allegation was apparently part of the plea bargain and a condition of defendant's plea.<sup>3</sup> Because there was no dispute that defendant's plea was freely and voluntarily made, had a factual basis, and was approved by the court, the court here did not abuse its discretion in ordering defendant to pay victim restitution. (See *Beck, supra*, 17 Cal.App.4th at pp. 215-216.)

#### DISPOSITION

The judgment is affirmed.

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McKINSTER  
J.

We concur:

RAMIREZ  
P. J.

RAPHAEL  
J.

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<sup>3</sup> We note defendant's argument in his reply brief that the court erred in relying on his criminal history in determining restitution, since that went beyond the scope of the *Harvey* waiver. However, "we review the ruling, not the court's reasoning and, if the ruling was correct on any ground, we affirm." (*People v. Geier* (2007) 41 Cal.4th 555, 582.)